Office - Supreme Court, U.S.
FILED
OCT 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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OPPOSITION TO MOTION TO AFFIRM

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The FEC's proffered "question presented"—describing the ruling below as one upholding a Congressional decision "not to prohibit totally corporate solicitation of executive and administrative personnel"—grossly misreads a ruling that explicitly addresses three discrete constitutional questions. That ruling adjudicates a serious First Amendment issue concerning a statute under which vulnerable career employees are subjected to coercive methods of political solicitation by their employers. Another constitutional issue addressed below arises from the Congressional decision, when barring institutional spending by corporations and unions in federal elections, to limit unions to voluntary donations from their members yet to allow corporations not only to solicit stockholders but also to squeeze political payments from their vulnerable career employees. A final important

First Amendment issue arises from the ruling below that it was valid for Congress to authorize the spending of stockholders' assets to finance the corporate political fund without affording an objecting stockholder any protection against partisan use of his corporate assets.

The Commission's Motion to Affirm is most notable for its silence on our primary objection to the ruling below—its express rejection of the "compelling interest" standard (J.S. App. 26a-28a). Nowhere is there any answer to our specific demonstration (J.S. 14-18) that the court below thereby overlooked this Court's repeated rulings that where First Amendment rights are at stake "compelling interest," and not "substantial relationship," is the applicable standard. See, e.g., *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Citizens Against Rent Control* v. *Berkeley*, —— U.S. ——, 102 S.Ct. 434 (1982); *Abood* v. *Detroit Bd. of Education*, 431 U.S. 204 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976). The strictest standard of review is surely applicable here, to measure statutory intrusion on rights of political abstention by corporate employees and stockholders and the equal treatment rights of labor organizations under election spending limitations imposed uniquely upon unions and corporations. There is eloquence in the silence of the Commission on the lower court's application of a diluted First Amendment review standard to statutory provisions that intrude directly upon fundamental political liberties.[1]

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[1] The Commission (Motion 10-11) contests the ruling below that appellants possess the requisite standing. But appellants' equal protection and stockholder claims undeniably present the requisite "real and palpable injury," for the union appellants assert that the discriminatory imbalance in FECA diminishes their political voice and the stockholder appellants contend that their First Amendment liberties are violated by application of their corporate assets to subsidize political activity which they oppose. And as to the violation of corporate employees' First Amendment rights, the court below properly found that the union plaintiffs have standing to complain—reasoning that corporate infringement on "employees' right of politi-

Moreover, as we next demonstrate, the Commission also fails to justify the constitutional infirmities of the statute excused by the court below under its diluted standard of review:

1. Coercive Means of Career Employee Solicitation. Far from seeking to preclude solicitation of career employees, our principal claim for their protection addresses the coercive means of solicitation to which they are being subjected. As the court below recognizes in a revealing quotation from the Congressional Record (J.S. App. 42a), it is probable that any employee solicited by his own employer "is going to be intimidated and coerced, because the entity soliciting the funds is . . . the one which also gives the salary raises and promotions." That is truer still of the career employee, who is entirely dependent on employer favor for his raises and promotions. And to the inherently coercive effect of such employer solicitations, there is added here the deliberate exploitation of career employee vulnerability by the use of supervisor solicitations, peer group meetings, and other compulsive methods of political fundraising. Though Congress never suggested that corporations could bring such suspect employment-related pressures to bear in soliciting their career employees, the permissive statutory construction below has just that effect, plainly rendering the

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cal abstention," if present, leads "to greater corporate PAC expenditures," causing "a relative diminution of the plaintiffs' political voices, which is one of the asserted injuries they seek to redress in this litigation" (J.S. App. 13a). The union appellants thus seek to remedy their own injury resulting from violation of corporate employees' constitutional rights, thereby meeting the requirement that there be "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" (*Larson* v. *Valente*, —— U.S. ——, 102 S.Ct. 1673, 1680 (1982), quoting *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Authority*, 429 U.S. 252, 261 (1977)).

FECA constitutionally defficient by authorizing such employment-related coercion of vulnerable career employees.[2]

The FEC's only response to our First Amendment objections is to urge inappropriate "deference" to Congress in an area where the primary judicial deference must be to the First Amendment. The finding that "deference" is due the Congressional action rather than to First Amendment freedom reflects the erroneous rejection by the court below (J.S. App. 45a-47a) of the strict "compelling interest" First Amendment standard. As even the Commission has recognized, there is "a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer" (*SUNPAC* Advisory Opinion 1975-23). Yet nowhere does the Court of Appeals suggest any possible compelling interest served by solicitation methods that exploit that potential for coercion. Every legitimate interest in permitting corporations to sponsor PACs can be served without authorizing liberty-eroding pressures that induce employee contributions from considerations of fear or favor. *In the absence of any compelling interest warranting FECA's*

[2] Nor does this Court's denial of review last term in our § 437g statutory challenge to coercive employer solicitation, contrary to the Commission's suggestion (Motion 13), have any bearing here. The critical facts documenting coercion were obtained by discovery in the present case and the three issues were certified under § 437h, not in the Commission proceeding that was the subject of the § 437g case. Indeed, the Commission's Opposition therein (p. 9, n.8) urged that the present facts were not then properly before the Court. As the ruling below makes clear (J.S. App. 35a, n.7), only after adverse disposition of the § 437g complaint were plaintiffs freed to argue under § 437h "that the solicitation the statute permits is rendered impermissible by the Constitution." Far from precluding review of the constitutional issues now presented, this Court's denial of review in the § 437g statutory proceeding occurred with full knowledge of the pendency of an appeal in the present constitutional case, which naturally subsumes the statutory construction issues.

authorization of the compulsive solicitation means demonstrated on the present record, the statute plainly violates the First Amendment by its failure to afford for the career employee the same arms length solicitation and donor anonymity protections that Congress properly assured for the hourly workers to forestall less than fully voluntary political payments.

2. The Unequal Limitation of Union Federal Election Spending. In the asserted interest of maintaining parity between business and labor, Congress extended to labor unions the long standing ban on corporate federal election spending; but with the recent FECA amendments authorizing corporations to squeeze political tribute from their employees, unions are far more severely curtailed than corporations in their ability to spend in federal elections. Whereas unions can obtain election funds only through voluntary member donations, corporations can obtain payments for election use not only from their stockholders but also from their vulnerable career employees. The masses of career employees of the nation's major corporations represent a potent source for corporate election funds that threaten to overwhelm the voice of labor under the more limited exception that Congress has allowed to unions. And the imbalance is rendered the greater by the lower court's refusal to bar the use of employment-related contribution pressures on such career employees.

The FEC's proffered justification for that statutory inequality—that Congress is not required to "equalize" the political strength of unions and corporations—repeats the flawed rationalization voiced by the lower court. If Congress had not barred unions and corporations from spending their funds in federal elections, no equality principle would come into play. But having forbidden unions and corporations to spend their institutional funds in

federal elections, Congress cannot constitutionally then provide a limited exception for unions permitting only members' donations while providing a double and potent escape for corporations freed to spend funds paid by both stockholders and vulnerable employees. In this context it is the unions who can claim the *Buckley* rule that the Commission would invoke against them (Motion 16), that Government may not "restrict the speech of some elements of our society" to enhance the voice of others.[3]

Nor is it an answer to the discriminatory statutory limitation of union election spending that career employees are "roughly comparable" to stockholders as the "beneficial owners" of the corporation. The legislative language to this effect reflected the more narrow House version of the 1976 Amendment (H.R. 12406), which would have permitted only a handful of corporate "executive officers" to be solicited rather than all middle management employees—engineers, professionals, plant, division and section heads—who were ultimately subjected to such solicitations (see J.S. App. 20a). Unlike "executive officers," who usually share in corporate profits, the vast numbers of middle management employees who have no such interest cannot tenably be regarded as if they were "beneficial owners" of the corporation "roughly comparable" to stockholders.[4]

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[3] The Commission again suggests, as it did below (Motion 15-16), that disparate treatment of unions and corporations in this vital First Amendment area is permissible because "the regulation of these different types of organizations need not be identical." That effort to escape the equal treatment requirement is answered by the lower court's own rejection of that same contention (J.S. App. 33a, n.72): "We do not conclude that corporations and labor unions are so dissimilarly situated that equal protection scrutiny may be avoided. Indeed . . . Congress considered them in many respects similarly situated."

[4] In pushing beyond stockholders to permit corporate solicitation of employees, the statute also transgresses the operative principle

In any event, the 1976 amendments create so gross an imbalance between the exception from the spending ban allowed unions in contrast to that afforded corporations, that the resulting deterioration in the political voice of labor cannot possibly survive the compelling interest standard of scrutiny that the court below should have applied. Indeed, that court nowhere suggests that the "roughly comparable" rationalization for extending corporate solicitation beyond stockholders to career employees could satisfy the strict constitutional standard. *No possible compelling interest has ever been suggested, and none exists, to justify a legislative scheme that in the name of parity between unions and corporations affords labor only a narrow crevice but provides corporations a gaping chasm to escape the statute's ban on institutional spending in federal elections.*

3. Political Use of Dissenting Stockholders' Assets. In construing the FECA to authorize the use of objecting stockholders' assets to pay the operating costs of the corporate political fund, the court below creates the First Amendment vice this Court wisely avoided in *Machinists* v. *Street*, 367 U.S. 740 (1961), and *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), barring compulsory support for politics by an objecting union member. The First Amendment, we submit, equally bars such compulsory support by stockholders under the authority of this federal statute, which should properly be construed

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claimed by the FEC to justify union and corporate PACs. As the Commission states in its brief in No. 81-1506, *Federal Election Commission* v. *National Right to Work Committee* (p. 31) in the case of unions and corporations, acting as a surrogate for institutional spending, the statute "properly limits separate segregated funds to soliciting contributions only within the sponsoring organization, from those classes of individuals whose interest the corporate or union has a fiduciary obligation to represent." There could be no credible claim that the corporation has a fiduciary obligation to represent its middle level employees such as applies in the case of its stockholders, to say nothing of the fact that coercive solicitation of employees is the antithesis of the exercise of fiduciary responsibility.

to safeguard a stockholder's right to abstain by affording him an appropriate rebate or payment.[5]

The Commission echoes the lower court's overreading of *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), in its attempt to distinguish between the political liberty of the employees protected in *Street* and *Abood* and the political liberty of the stockholders denied by the ruling below. For unlike the issue in those two labor union cases and in the present case—the dissenter's right to abstain from financing the majority's political action—the issue in *Bellotti* was whether silencing the majority is justified for the protection of the minority. It was in that quite different context that this Court voiced the distinction between the mobility of the employee and that of the stockholder—the distinction upon which the Commission here principally relies. Moreover (as we demonstrated in our Jurisdictional Statement with no response by the Commission), so many American corporations now operate political funds and the number is growing so rapidly, that an objecting stockholder has little opportunity to transfer his assets to a corporation that will not use his money to operate a political fund. In terms of the numbers of such corporations, there are today more major American companies to which an employee could transfer his employment without any duty to pay union dues or agency fees than there are corporations to which a stockholder can transfer his assets to

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[5] The Commission (Motion 19-20) quibbles that no rebates to objecting stockholders were urged in the court below. But such payments are simply the practical means to secure the constitutional rights claimed below by the stockholder plaintiffs. The certified question resolved by the court below (see J.S. App. 8a-9a, n.11) asked whether the statute's authorization of the use of corporate assets for the cost of the PAC violates "the First Amendment right of a stockholder who objects to the use of his corporate assets for political purposes?" The issue we frame before this Court in terms of rebates is thus not a new issue, but merely the remedial consequence of the constitutional right of abstention from political support claimed below, upon which the Court of Appeals issued an adverse ruling.

avoid compulsory support of a political fund's costs. *There is thus every reason for review of a ruling that gives less constitutional protection from forced political exaction to the beneficial owners of the corporation than is afforded by this Court's rulings protecting the political abstention rights of unionized employees.*

* * * *

We note in conclusion that however this Court rules in *Federal Election Commission* v. *National Right to Work Committee*, No. 81-1506, the proper outcome here remains clear. If the Court should there determine that Congress, in the interest of confining institutional moneys in elections to funds derived from member-constituents, can deny the Right to Work Committee the right to solicit funds beyond its members, certainly the same interest here impugns funds solicited from mid-level employees who are in no way constituents of the corporation. If, on the other hand, this Court applies the "compelling interest" standard and finds that Congress may not forbid the Right to Work Committee to solicit outside its constituency, it is hard to see how under the same strict standard Congress may deny corporate employees and stockholders a full right to abstain from political action, and may impose more onerous restrictions on the political solicitation and spending rights of unions than those applying to corporations.

We urge that the Court note probable jurisdiction in this case.

Respectfully submitted,

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October 26, 1982